

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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NORTHERN DISTRICT OF OHIO
CLEVELAND

PRESTON FAYNE,

Petitioner,

v.

MARC HOUK, Warden,

Respondent.

CASE NO. 1: 09 CV 1325

JUDGE DONALD E. NUGENT

MEMORANDUM OPINION
AND ORDER

This matter comes before the Court upon the Report and Recommendation of Magistrate Judge Nancy A. Vecchiarelli. The Report and Recommendation is ADOPTED by this Court (ECF # 14), and Petitioner's Motion to Vacate, Set Aside, or Correct the Sentence pursuant to 28 U.S.C. § 2254 is DENIED (ECF # 1).

The Report and Recommendation provides the following procedural history concerning Petitioner's conviction:

The January, 2007 Term of the Cuyahoga County, Ohio Grand Jury indicted Fayne on two counts of Aggravated Robbery in violation of Ohio Revised Code R.C. § 2911.01 with firearm, prior conviction and repeat violent offender specifications; one count of Felonious Assault in violation of R.C. § 2903.11 with firearm, prior conviction and repeat violent offender specifications; and one count of Having a Weapon While Under Disability in violation of R.C. § 2923.13 with firearm specifications. Fayne pled not guilty to the charges in the indictment. Prior to trial, Fayne waived a jury trial with respect to the prior conviction and repeat violent offender specifications in counts one, two and three. A jury heard the remaining charges. Fayne moved for a Criminal Rule 29 acquittal at the close of both the State and Defense cases. The court denied both motions. On May 10, 2007, the jury found Fayne guilty of one count of Felonious Assault, but not guilty of the remaining charges heard by the jury. The trial judge found Fayne guilty of the charges of a prior conviction and the repeat violent offender specifications charged in count three. The court also found Fayne guilty of having weapons while under disability with the firearm specifications in count four.

(ECF # 14 at 1-2 (citations omitted).) On May 15, 2007, Fayne was sentenced to an aggregate

term of twenty-one years in prison. (*Id.* at 2.)

Petitioner filed this motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2254 on June 10, 2009, raising three grounds for relief.¹

Pursuant to Local Rule 72.2, this matter was referred to Magistrate Judge Vecchiarelli for the preparation of a report and recommendation. On January 28, 2010, Magistrate Judge Vecchiarelli recommended that this Court deny the Petition. Petitioner has not filed any objections to the Report and Recommendation.

The Court has reviewed the Report and Recommendation *de novo*. See *Thomas v. Arn*, 474 U.S. 140 (1985). The Court finds Magistrate Judge Vecchiarelli's Report and Recommendation to be well-written, well-supported, and correct. Therefore, the Report and Recommendation is ADOPTED in its entirety. (ECF # 14.) Petitioner's motion to vacate, set aside, or correct the sentence is DENIED. (ECF # 1.)

Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.


DONALD C. NUGENT
United States District Judge

DATED: April 12, 2010

¹ Petitioner labeled his grounds as Ground One, Ground Three and Ground Four, but he did not assert a Ground Two in his Petition. Hence, the Petition as written contains three grounds for relief.